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Leon Fannesbeck; Attorney for Appellant;

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In the Supreme Court of the State of Utah

MOSES BLANCHARD,
Plaintiff and Appellant

-VS-

DONALD E. SMITH, et al,
*Defendants and
Respondents.*

APPELLANT'S
BRIEF
No. 7869

Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, District Judge

FILED

AUG 8 1962 LEON FONNESBECK

Attorney for Appellant
Clerk, Supreme Court, Utah

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MOSES BLANCHARD,
Plaintiff and Appellant

-vs-

DONALD E. SMITH, et al,
*Defendants and
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BRIEF
No. 7869

STATEMENT OF FACTS

Plaintiff brought this suit to quiet title to 4 rods of his deeded premises described in paragraph one of his complaint. Defendants filed a counterclaim asserting title in them to 19 feet of plaintiff's premises, lying north of a board fence, which they alleged plaintiff surveyed, built and agreed to in 1905 as a boundary line. All of this plaintiff denied, and testified that the fence was built when he came. (tr. 37)

Thus this is a boundary line dispute between plaintiff and defendants. Their titles were deraigned from a common source, from the Estate of Halver O. Tiller, deceased, who owned both tracts as part of a larger tract during his lifetime. The decree of Distribution in said estate, (Ex. H) dated July 5, 1902, distributed

the south one chain (4 rods) to Edith M. Tiller, who in turn deeded the same to the plaintiff August 1, 1904, (Ex. L) and the plaintiff thereby became the owner of the south 4 rods of the Halver O. Tiller premises. The adjoining 4 rods (1 chain) on the north were distributed to George Tiller, defendants' grantor and predecessor in interest; and the north tract, not involved herein, was distributed to Helen Tiller (tr. 7)

Each of said three tracts thus distributed are described by metes and bounds, made by a surveyor, as the executrix, Mrs. Anna Peery, testified her attorney W. W. Maughan had it surveyed, at time of said probate proceedings (tr. 60,66), the respective descriptions of each tract (as the abstracts show) have always remained the same—a mete and bound description. The boundary descriptions clearly show that there is no uncertainty, that the north line of plaintiff's lot coincides with and is the south line of defendants' lot (see Ex. J) and that the boundary line between them is an east and west line, commencing 6.88 chains south of the northeast corner of lot 1, plat "B" Logan City Survey, and running thence west 2.43 chains. The court found, "the means of ascertaining the true line has always been available".

One important and controlling fact in this case is *the mistake of fact*, a mutual mistake of fact, which the lower court refused to notice, meet, or recognize. It concerns the one rod strip of ground adjoining on the

south side of plaintiff's premises, which belonged to Logan City, but which the plaintiff (and also the Tiller people) mistakenly believed was his property. If that one rod had belonged to plaintiff, then he would have had approximately 4 rods south of said fence, (all but $2\frac{1}{2}$ feet). Plaintiff continued in that belief until his premises were surveyed by the City Engineer, when the curb and gutter was put in, in 1948 (Ex. M) (tr. 39-43) The plaintiff testified: "I think that's what fooled us." (tr. 45) "I didn't know Logan City owned it, but thought that Tiller owned it." (tr. 46) "He (Tiller) figured it was part of his property and I thought it was too." (tr. 47) "I knew we had 4 rods apiece. I sat the house down where I thought it was on my ground." (tr. 48, 79) (Plaintiff built his house next to said one rod strip which he has used through the years as a driveway).

The Tiller people likewise labored under said mistake of fact, as we shall later point out.

Other important and controlling facts are: (a) Plaintiff knew that the fence was not on the boundary line. (tr. 76)

(b) There is no evidence of any dispute. On this point the court found: "Neither the defendants nor any of their predecessors in interest, so far as can be ascertained, ever knew that there was any thought of dispute of the property line until the time hereinafter mentioned."

(c) There is no evidence of any uncertainty or indefiniteness. This counsel sought unsuccessfully to establish by defendant's grantor, George Tiller, thus: Q. Did you know whether or not there was an indefiniteness existing as to that property? A. Never heard of any. (tr. 4)

(d) There is no evidence that the plaintiff had agreed to accept said fence as the boundary line between them.

Plaintiff denied that he had done any surveying, or constructed said fence, and testified that the fence was there when he came. (tr. 37) Plaintiff alleged and the evidence shows that he executed to the Fedral Land Bank a \$2,000 mortgage, also a Public Welfare Lien to the State of Utah. The court, without ordering said bank or the State be made a party, quieted title in defendants to plaintiff's 19 feet north of said fence, covered by said mortgage in violation of Civil Rules 13(g).

The plaintiff admits that he built his garage, chicken coop and other buildings up to said fence, due to his mistaken belief that the one rod strip was his property. (tr. 79) As soon as he learned the facts, the plaintiff procured a quit claim deed for said one rod from Logan City (Ex. P) (tr. 30-31) and then tried to effect a settlement with defendants. (tr. 29, 40) When that failed, he commenced moving the fence over on the true line, which defendants forbade. (Ex. K) (tr. 36) Plain-

tiff then filed this suit to quiet title to his deeded 4 rods.

Plaintiff testified that he knew that said fence was not on the correct line; that he had about 21½ feet on the north side of said fence. (tr. 76)

No issue was raised as to the ownership of said one rod south of plaintiff's property. That issue was injected by the trial court. (tr. 83) The evidence, by defendants' own expert witness, Crockett, showed that Halver O. Tiller never acquired any interest in said one rod. And that the same belonged to Logan City. (tr. 945) (See also tr. 85). The court nevertheless found: (1) "That Halver O. Tiller was the true owner of said one rod strip, and (2) that Logan City never was the owner of said south one rod of land."

There is no allegation or issue and no evidence concerning payment of taxes on said one rod strip, and no evidence of any "mixup" in assessment of property, the trial court nevertheless found: "Through a mixup in connection with the assessment of property, the said one rod above referred to has never been assessed for taxes."

It was agreed in open court that plaintiff and defendants had each paid all general and special taxes on their respective record titles. Plaintiff's 4 rods included the 19 feet in dispute (27.27% of his 4 rod frontage). The abstract and tax record (Ex. A, E, F, N, O,) show that plaintiff paid, on sidewalk assessment, \$82.50:

on sewer assessment \$259.12; on curb and gutter assessment, since dispute arose, \$137.65; on general taxes since dispute arose, \$167.00. Total: \$646.27. The lower court refused to require defendants to compensate plaintiff for any taxes he had paid on said 19 feet, amounting to about \$126.00, but awarded that property free and clear to defendants' because: "plaintiff has never paid any general or special taxes upon said one rod strip."

There is no evidence or claim of any buildings or improvements of any kind upon the 19 feet in dispute. Defendant Smith testified that he did not check the description but merely took it for granted that the fence was on the line. (tr. 20)

The plaintiff and his two sons positively testified that for many years they had used the premises north of said fence for hauling hay, beet pulp, and for their derrick horse. (tr. 30, 39, 42-3 50, 53) Defendants' witnesses mainly denied they had seen such use. On such evidence the court found plaintiff had never used the premises north of said fence.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Point No. 1. The court erred in failing to meet, find, or recognize the fact, clearly shown by the evidence, that the plaintiff had been acting under a mistake of fact (a mutual mistake of fact) in recognizing or assum-

ing that the alleged fence was near the boundary line, due to his mistaken belief that the one rod, adjoining on the south of his premises, was his property.

Point No. 2. The court erred in entering its decree quieting title in defendants “of that certain property north of the fence line,” (19 ft. of plaintiff’s premises) for (1) the evidence does not show any uncertainty or any dispute as to the boundary line, but shows that the fence was already there when plaintiff came; fails to show that the plaintiff had ~~never~~ agreed to accept said fence as a boundary line, or that defendants had paid any taxes on the 19ft. in dispute; and (2), the court did not have jurisdiction to enter its decree quieting title to said 19 feet without first ordering the State and the Federal Land Bank be made parties to this proceeding, as required by 13(g) Rules of Civil Procedure.

Point No. 3. Some of the court’s findings are outside the issues, without evidence to support them, and contrary to the evidence: (a) The court’s two way finding, “that Halver O. Tiller was the true owner of the one rod strip south of plaintiff’s premises”; that “Halver O. Tiller in his lifetime considered the one rod of land at the south end of plaintiff’s premises as part of said Tiller’s property.” (b) The court’s finding, “that Logan City was never the owner of the said one rod strip”; also (c), the court’s finding that, “through a mixup in the assessment of property the said one rod has never been assessed for taxes.”

Point No. 4. Some of the court's findings are contrary to the weight of affirmative evidence: (a) The court's finding that plaintiff had not used the premises north of the fence for hauling beet pulp, hay, coal, derrick horse, etc.; and (b), the court's finding that the plaintiff did or caused the survey to be made and that he built the alleged board fence, on uncertain and indefinite testimony of George Tiller and Mrs. Peery, and against the positive testimony of the plaintiff to the contrary and that the fence was there when he purchased his premises.

Point No. 5. The court erred in finding and holding that plaintiff is estopped from asserting title to his 19 feet north of said fence.

Point No. 6. The court erred in justice and equity, by refusing to assess defendants with a pro-rata share of the special improvement and other taxes paid by the plaintiff on said 19 feet, after awarding said premises to defendants.

ARGUMENT

As we think the *mistake of fact*, stated in Point No. 1, herein, is one of the controlling factors in this case which excludes it from the rule permitting new boundary line to be fixed by oral agreement, we want to refer a little more to the testimony of the parties in order to show that here was a mistake of fact which controlled plaintiff's actions through the years, and that the mis-

take was also *mutual mistake of fact*—that the Tillers as well as the plaintiff were misled and believed and understood that said one rod strip was part of the Tiller estate, was deeded to the plaintiff by Edith M. Tiller. Thus:

George Tiller: “I never heard before that the surveyor gave me over 5 rods and Blanchard less than 3 rods. (tr. 11) Edith and I each got 4 rods. I didn’t intend to deed away any of Blanchard’s property. (tr. 14) When the fence was put up, I figured Mose Blanchard got 4 rods south of the fence. The deeds would call for the right property, I thought (tr. 12) I didn’t figure he was turning any of his property over to me.” (tr. 13)

Mose Blanchard: “That one rod fooled us all, I am satisfied about that.”

Q. (by Mrs. Anna Peery) When did you find out about this rod?

A. When they put the curb and gutter down, three years ago. Never knew about it before. (Ex. C) Yes, if I had known it, I would have had it done (fence moved) long, long ago. (tr. 77, 41) “It was the one rod there that threw us crooked.” (tr. 78)

Mrs. Anna Peery: Testified that her father said: “I’ll have to buy that little piece of ground so it can parallel with the street.” “I thought that all belonged to my father’s estate. (tr. 65) I intended for Mose to

have 4 rods as his deed calls for, but I thought it was measured from the lower fence. (tr. 68) It was my understanding my father bought that from Logan City. There was, of course, no intention on our part that Blanchard should have less than 4 rods. (tr. 70)

RULE OF BOUNDARY BY ACQUIESCENCE

Appellant is not contending against the rule of boundary by acquiescence, long recognized in this state, when the location of the true boundary line between adjoining tracts is *unkown, uncertain or in dispute*, the owners thereof may by parole agreement irrevocably establish the true boundary line between them. That rule has been settled by this Court as the law in this State. *Brown v. Milliner*, 232 P 2d 202; *Tripp v. Bagley*, 276 P. 912, 69 ALR 1417; *Rydalch v. Anderson*, 107 P 25; *Holmes v. Judge*, 87 P. 1014.

EXCEPTIONS TO RULE

But there are a number of exceptions or limits to the above rule which this court and other jurisdictions have recognized as defenses thereto, and which, if the facts warrant, will prevent the above rule from being applied so as to change the boundary line from the true line by oral agreement or by acquiescence of adjoining owners in disregard of the Statute of Frauds. Thus:

(1) *Mistake of Fact*. In the case of *Brown v. Milliner*, *supra*, this court, speaking through Chief Justice Wolfe, said:

“In *Holmes v. Judge*, supra, we declared that the doctrine of boundary by acquiescence ‘rests upon sound public policy, with a view of preventing strife and litigation concerning boundaries’ and that ‘While the interests of society require that the title to real estate shall not be transferred from the owner for slight cause, or otherwise than by law, these same interests demand that there shall be stability in boundaries’. However, in that case we were careful to mark off the limits of the rule. Said the court: ‘We do not wish to be understood as holding that the parties may not claim to the true boundary, where an assumed or agreed boundary is located through mistake or inadvertence, or where it is clear that the line as located was not intended as a boundary, and where a boundary so located has not been acquiesced in for a long term of years by the parties in interest’. (31 Utah 269, 87 P. 1014.)

The law here involved is fully annotated in 69 ALR 1430-1533, following *Tripp v. Bagley*, supra. Although there are some cases to the contrary, the big majority of the cases there cited under the subhead “Effect of Mistake” on pages 1485-1489 of said annotation, hold in harmony with *Brown v. Milliner*, that where a party has acted under a mistake of fact, especially a mutual mistake of fact, such party is not estopped, but may claim to the true line upon discovery of the mistake, just as plaintiff tried to do when he discovered his mistake. We quote excerpts from a few cases under said subheading “*Effect of Mistake.*”:

“In view of the mutual mistake of the parties, the facts did not raise the issue of an agreed boundary line.” 8 S.W. 549 (Mo.). “In such a case there is a failure to find the true line through accident or mistake.” 80 N.E. 350 (Ill.). “A party will not forfeit his estate by mere mistake nor can the Statute of Frauds be thus evaded.” 70 Am. Dec. 57 (Ohio). “Such a parole agreement founded in mistake would not be binding by way of estoppel or otherwise.” 5 Met. 469 (Mass.). “When the mistake was discovered, neither of the parties was estopped from claiming his rights.” 14 S.E. 153 (W.Va.).

Even the contra cases cited first under said sub-head “Effect of Mistake”, page 1485, which hold the oral agreement valid notwithstanding the mistake of fact, can all be distinguished from the facts in case at bar.

Thus it is our contention that the rule establishing boundary line by acquiescence cannot and should not be applied against plaintiff in case at bar, because his acquiescence (if the court holds he acquiesced in said said fence as a boundary line) has rested on his mistaken belief and understanding all through the years, until 1948 when his premises were surveyed, that said south one rod strip was part and parcel of the 4 rods he purchased from Edith O. Tiller in 1904. Soon as he learned the facts he took action to have fence moved (tr. 19,50)

(2) *Parties knew fence was not on true line.* In *Tripp v. Bagley*, *supra*, this court held that if the parties knew that the fence was not on the true boundary line, then we have an exception to the above rule; that in such case the true boundary line could not be changed by mere acquiescence or change of possession “even though such change in possession continues for a long period of time.” Said the court:

“The question for determination in this case is whether the facts here bring it within the general rule or constitute an exception thereto . . . It thus appears that the parties to this suit knew that the fence C-D-E did not and could not be along the true boundary line between the property owned by the plaintiff and that owned by the defendants . . . This court has recognized the rule that, where coterminous landowners know the location of the true boundary line, they may not establish a valid boundary line between their lands by mere parole agreement at a place other than the true line . . . If adjoining landowners acquiesce in a division line, with knowledge of the location of the true line and with the design and purpose of thereby transferring a tract of land from one to the other, such acquiescence alone will not operate as a conveyance. Land cannot be conveyed from one person to another by merely a change in possession, even though such change in possession continues for a long period of time.”

We have already pointed out that plaintiff testified that he knew that said fence did not give him his 4 rods (even assuming the south one rod belonged

to him) that he thought he had about 2½ feet north of said fence, hence case at bar comes within the same exception as this court pointed out and held in *Tripp v. Bradley*, to-wit: If one of the adjoining landowners has knowledge, or understands, that the fence in question is not on the true line, the rule permitting a boundary line to be fixed by parole agreement or acquiescence does not apply.

(3) *NoDispute and No Uncertainty*. As we have seen the plaintiff and defendants and their grantors in interest all testified, and the court found, that there had never been any dispute concerning the boundary line between them. The witnesses all agreed that the fence had never been discussed. One of the necessary prerequisites, a condition precedent, for the above rule to apply is that the "location of the true boundary line must be in dispute or uncertain". If there is no dispute and no indefiniteness, what is there for the parties to agree upon? We copy from page 1502 of the above annotation in 69 A.L.R. thus:

"In *Talbot v. Smith* (1910) 56 Or. 117, 107 P. 480, 108 P. 125, to defeat the description in a deed, the plaintiff urged that a fence line or a stake set up by someone had been acquiesced in for a long time, and should control. The court said: 'But there never was any dispute as to where the line should be; nor was there any circumstance to call for a settlement of a dispute. Legal agreements as to disputed boundaries are based upon the fact that the true line is not only

in dispute, but to some extent undefined and unknown.'

"In *Jeffries v. Sheehan* (1928) 242 Mich. 167 218 N.W. 703, the court said: 'If the boundary line of lot 28 was never in dispute and the fenced in portion of lot 2 was but an encroachment, then plaintiff's right, if any, to the disputed strip, rested upon prescription, and not on a boundary line established by acquiescence.' "

Defendants, in case at bar, cannot succeed in their suit (counter-claim) in prescription, for they failed to prove that they had ever paid any taxes on the 19 feet in question.

Neither did defendants prove any *uncertainty* or *indefiniteness*. The respective deeds prove just the contrary. Appellant contends that is certain which can be made certain. That which is certain and definite will prevail, 11 C.J.S. 538-9. The premises are described in each deed by metes and bounds. Each tract is tied to the N.E. corner of Block 1 Plat "B", Logan City Survey. Both deeds were recorded. The division line is thus fixed by the descriptions in the deeds, which defendants seek to defeat in case at bar. As we have pointed out, George Tiller said he had never heard of any uncertainty, that he thought, "the deeds would call for the right property." (tr. 12)

"In *Hartung v. Witte* (1884) 59 Wis. 285, 18 N.W. 174, it was said that that is certain which can be made certain, and if the true line cannot be made certain by the deed and a survey, or

by calls and monuments mentioned in the deed, then, only, it may be made certain by acquiescence of the parties.”

In locating courses, the intent of the parties, as derived from the instrument itself, is to govern. 9 C.J. 167. The burden of proof was upon defendants. 8 Am. Juris. pg 810; 69 ALR 1489.

(4) *No Agreement*: A further fatality in defendants’ case is their failure to prove any agreement by the plaintiff to accept the fence as a division line. As we have seen, neither George Tiller nor Mrs. Peery testified that they had any such agreement with the plaintiff. They merely claimed that they saw the surveyor drive the peg and heard him say, “this is the line” (tr. 9, 61) and that plaintiff made no objection. That did not prove any agreement by plaintiff. We submit that only shows defendants’ witnesses were confused, that the survey they saw and testified about was the one directed by Attorney Maughan when he probated the Tiller estate. The court found that “plaintiff’s property was distributed in accordance with the survey directed by the late W. W. Maughan.” Why would plaintiff want a second survey, 2½ years later? When the deed he received was certain and specific by mete and bounds? Defendants do not explain. There was, of course, only one survey. Defendants’ two main witnesses also contradict each other, thus:

George Tiller testified that he saw plaintiff build

that old board fence. Mrs. Peery testified it wasn't a board fence, but a hog-wire fence. (tr. 71) We ask: when was it changed to the present old board fence? They don't explain. George Tiller also testified that plaintiff built the fence first, and then built his house "about ten feet south of the fence (tr. 5); Mrs. Peery testified that plaintiff built his house first, and then, when he was ready to move his family in, he built the fence. (tr. 62-3)

Plaintiff testified that he started building his house in 1904, after he bought his premises; that he "set the house on what I thought was my property", which shows that he then believed that said south rod was part of his property and that he built his house with reference to what he thought was his south lines, as he left only a driveway south of his house, not with reference to any fence on the north side of his house.

We submit that defendants' evidence, that plaintiff built that fence is so confusing and contradictory that it falls of its own weight. We quote from Mrs. Peery's testimony: "Mose Blanchard knows that he built the fence. My 13 year old brother couldn't build it. We didn't have the money to build it with." (tr. 71) "I know he built it because I saw him." "I didn't build it. My father didn't build it. I say Mose did it or his boys did. I don't know who did it." (tr. 72) Mrs. Peery forgot the age of plaintiff's boys. Fred Blanchard is 47, (tr. 50), so he was a mere infant in 1905.

George Blanchard is 40 (tr. 31) so he wasn't born for several years later. So plaintiff's boys didn't build that fence.

Again, may we point out where defendants' witnesses defeat their own testimony in their insistence to claim that plaintiff built that fence. If George Tiller was then only 13 years old, as Mrs. Peery said, then that conclusively proves that the survey which George and Mrs. Peery saw (when the surveyor said, "this is the line") was the one Attorney Maughan directed to be made, when he probated the Tiller estate. Mrs. Peery has already told us that George was 13 years old when his father died in 1901 (tr. 60) which was of course, before the estate was distributed, (July 5, 1902) and before plaintiff purchased his premises from Edith M. Tiller (Aug. 1, 1904); all of which shows that plaintiff was not then interested in that property and therefore took no part in and knew nothing about any survey, just as he testified. Note also this testimony by Mrs. Peery which shows the survey line was out in the lot: A. He (the surveyor) said, "this is the line and it runs straight back to the river." Q. Was there a fence where the peg was driven? A. No. That was in our garden where we had corn and potatoes. (tr. 61)

For each and all of the foregoing reasons, we respectfully submit and pray that the trial court's judgment be vacated and this Court order title to be quieted in plaintiff as prayed for, and for his costs.

COURT ERRED IN REQUIRING PLAINTIFF TO PREPARE ADDITIONAL TRANSCRIPT

The foregoing brief had all been written and sent to the printers when defendant's counsel, on July 18, 1952, served a "Demand For Additional Evidence". On the same day we filed "Answer" to said demand, stating that "the transcript served June 21st, with designation of record, contains all matters essential to decision of questions presented by the appeal to the Supreme Court". We also asked counsel to "designate any point or item of testimony ommitted, in order that the same may be stipulated, or included in supplemental transcript, "we acted under Rule 75(e), which provides, "All matters not essential to the decision of the questions presented on the appeal shall be ommitted". Plaintiff is an old man, confined to a wheel chair; he is on Relief and can ill afford this additional, and, as we think, unnecessary expense.

Defendant's counsel refused to designate any omitted item of testimony, but the next day served "Designation of Record" etc., and also "Affidavit in Support of Relief for Failure to file Demand" etc. in time, as required by Rule 75(a). The court ordered plaintiff to file transcribed copy of all ommitted testimony, regardless of its materiality; and the court also restrained the Clerk from filing record of appeal with the Supreme Court "until said additional testimony is transcribed."

The court's order for plaintiff to furnish additional

testimony, is based on that part of rule 75(b) which reads: "If the designation does not include all the evidence, the appellant shall file a copy of such parts thereof as the respondent may need to enable him to designate the parts he desires to be added" etc. (counsel requested the full record in order to enable him to decide what part he wanted.) Said provision thus is contrary to the spirit and purpose of Rule 75(e), for if respondents can arbitrarily demand under Rule 75(b) that all of the record be transcribed, how can appellant obtain any relief from unnecessary costs? How can "all record be abbreviated under Rule 75(e)? How can "all matter not essential to the decision be ommitted"?

1. Appellant submits that the court erred in permitting respondent's designation of record to be filed after the time had expired; also that their designation was too indefinite, and that the affidavit for relief was insufficient to relieve respondents of their failure to file designation of additional portions of the record in time as required by Rule 75(a).

2. Appellant further submits and prays that Rule 75(b) be amended by this Court, by deleting that portion thereof above quoted, and substituting therefor the following: "If the designation does not include all of the evidence, respondent may file a copy of such parts

as he desires to have added, the expense of which shall

be added as costs to respondent, if he shall recover costs.”

Respectfully submitted,

LEON FONNESBECK

Attorney for Appellant